Supreme Court, U.S.
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NO. 92-111

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

GARY T. DIXON, Warden, Central Prison,
Raleigh, North Carolina, and LACY H. THORNBURG,
Attorney General of the State of North Carolina,

Petitioners,

v.

DOUGLAS WILLIAMS, Jr.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

---

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QUESTIONS PRESENTED

I. Inasmuch as the judgment below was expressly and independently bottomed upon a ground not mentioned, much less complained about, in the petition for writ of certiorari -- namely, the State's failure to raise an issue in the Court of Appeals in its brief or at oral argument as required by the Federal Rules of Appellate Procedure -- should this Court even entertain the questions presented in the Petition?

II. When none of the opinions relied upon by a petitioner mention a question -- i.e., whether non-retroactivity of criminal procedure rules is an affirmative defense which must be pled by the state in the district court in habeas corpus actions -- can those opinions possibly show a conflict in the circuits with regard to that question? (The State's question II.)

III. Do the rules requiring that issues should be raised by the parties in the manner provided in the Rules of Appellate Procedure, and that absent jurisdictional concerns issues not so raised may be waived, present important questions of federal law which have not been but should be addressed by this Court, especially when the petitioner has not complained about the application of these rules in this case?

IV. If it was an abuse of discretion for the Court of Appeals not to address a procedural issue (non-retroactivity), known about but withheld by the state on appeal until after the state lost the substantive issue in McKoy v. North Carolina, 494 U.S. 433 (1990), then should this Court address whether Lockett

v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), require relief for Douglas Williams because neither Mills v. Maryland, 486 U.S. 367 (1988), nor McKoy v. North Carolina, 494 U.S. 433 (1990), are new law, when the lower court did not address that issue and that issue is not presented (but is presumed) in the Petition?

V. Should this Court address whether a rule of criminal procedure would fall within an exception to non-retroactivity under Teague v. Lane, 489 U.S. 288 (1989), when the petition for writ of certiorari does not present the question of whether the rule is a new rule?

VI. Whether Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), the law at the time Douglas Williams' sentence became final, require that sentencers not be prohibited from considering relevant mitigating circumstances at capital sentencing?

VII. Whether this Court's striking of a requirement that sentencers unanimously find something to be mitigating before any single juror could consider that circumstance as mitigating constitutes application of bedrock procedural elements implicit in ordered liberty which assure accuracy in decision-making? (The State's Question I).

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BRIEF IN OPPOSITION

Comes the Respondent, Douglas Williams, Jr., and pursuant to a request from the Court submits his Brief in Opposition to the petition for writ of certiorari filed by Gary T. Nixon, Warden, Central Prison, Raleigh, North Carolina, and Lacy H. Thornburg, Attorney General of the State of North Carolina.

STATEMENT OF THE CASE

Respondent agrees with much of what is contained in the statement of the case presented by the State at pages 3 - 7 of the petition. However, in order for the Court to understand what Douglas Williams' sentencers were precluded from considering, and how they were precluded, the following additional statement of the case is submitted.[1]

A. There Was Mitigating Evidence for Sentencer Consideration.

The trial judge instructed the jurors regarding five (5) mitigating circumstances. During the charge to the jury, the judge summarized for the jurors the contentions of the parties regarding what the evidence showed. The judge's summary illustrates the "facts" to which the defendant's jury was required to apply the law, and presents some of the mitigation which could have affected "at least one juror's vote and thus the jury's sentencing recommendation." State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990).

For example, after instructing the jury regarding the statutory mitigating circumstance of whether the defendant was under the influence of mental or emotional disturbance at the time of the offense, the trial judge summarized:

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[1]The State's statement of the circumstances of the offense is not complete. A more complete description is contained in the lower court's opinion at A 6 - 7. Respondent also contends, and argued below, that relevant circumstances of the offense include the State's proof at sentencing that Douglas Williams has an IQ of 63 and the abundant evidence that Douglas Williams was highly intoxicated from alcohol and drugs on the night of the offense.

> As to that he contends that it was determined by a state psychiatrist in September of this year that the defendant suffers mild mental retardation, with an I.Q. of 63. That he reads at the grade level of 3.9. He contends that he was intoxicated. That his mind was disturbed.
>
> Mental disturbance, of course, has reference to the thinking process and the use of the mind.
>
> The emotional disturbance, if there be one, refers to a person's nerves, to his emotions, and the question here is whether the defendant because of his possible brain disease, his low I.Q., his inability to learn very much, his intoxication which he contends he was experiencing that night; as to whether all of those and he contends all of those combined to influence and did influence the mental and emotional disturbance and cause mental and emotional disturbance at the time of the murder.

R. 403. Similarly, with regard to the statutory mitigating circumstance of whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, the trial judge summarized:

> Now, he contends that he has a mental defect. That he is slightly retarded or mildly retarded is the word used by the psychiatrist. He contends that his capacity to conform his conduct to the requirements of the law was impaired; that it was lessened; that it was diminished, and his ability to appreciate the criminality of his conduct was lessened and diminished, that is, impaired.
>
> . . . .
>
> The defendant, however, contends that he had been drinking heavily and if not drunk was intoxicated and that with the pills he had been taking and the intoxicating liquors he had been drinking all combined to diminish

> and impair his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

R. 406-407.[2] Finally, the judge summarized several of the contentions in mitigation of punishment:

> His age; the condition he was in that night, whatever you find it to have been; his mental problems, if you find that he has one; his intoxication; his addiction to alcohol;

R. 409.

B. The Sentencers Were Expressly Required Unanimously To Find Something To Be Mitigating Before Any Single Sentencer Could Consider It To Be So.

At least three occurrences at Douglas Williams' sentencing proceeding demonstrate the sentencing error, which is not contested by the State. They are set forth herein verbatim from the transcript, without comment, in the following order: 1.) the sentencing instructions; 2.) the foreperson's question, and the judge's answer, regarding unanimity; and 3.) the sentencing form.

1. The Sentencing Instructions Required Sentencer Unanimity on Mitigation

The jurors in this case were instructed:

> I will submit to you certain issues relating to aggravating circumstances and relating to mitigating circumstances. It is for you to

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[2]A similar summary was given regarding the statutory mitigating circumstance of "age": "He contends that he is still a very young man and that is a circumstance that mitigates whatever his conduct may have been." R. 408

say whether any of them exist and, if so, which ones.

I will first read the issues to you and explain them in the order that they are listed.

Number one. Do you unanimously find from the evidence and beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?

. . . .

The second issue: Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?

. . . .

The third question: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

And four: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

Then there is a place and a date for the signature of the foreman of the jury.

. . . .

After considering issue number one and the subsections (A), (B), (C) and (D), you will consider issue number two which reads: "Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?"

. . . .

[Y]ou should consider all of the things that we have discussed concerning mitigation, that is, his age; the condition he was in that night, whatever you find it to have been; his mental problem, if you find that he has one;

his intoxication; his addiction to alcohol; all the circumstances that you deem to be of mitigating value or any of the circumstances you deem to be of mitigating value; and if you find from the evidence any circumstance which you deem to have mitigating value, you would answer that, "Yes." Otherwise, you would answer it, "No."

Then, members of the jury, you should go to the third issue which reads: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

As to that issue, members of the jury, if you have found at least one aggravating circumstance to exist, one or more, you would go to issue number three which reads, "Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?"

Now, when you come to consider that question, it is not who has the most favorable answers to the issues and to the questions. It is not a question of numerical weight. The question is the weight of the testimony and the weight of the circumstances you find to exist as to whether those which are aggravating outweigh in your minds the mitigating circumstances. And if you find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh, that is, in value and in importance the mitigating circumstances, you would answer that, "Yes." Otherwise, you would answer it, "No."

If you answer the third issue "No," you would not consider the fourth issue, and under those circumstances you would stop there and recommend life in prison, but if you answer that issue "Yes," you will go to the fourth issue which reads: "Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?"

> This is simply a matter for you to determine, members of the jury, based upon your findings concerning the aggravating and mitigating circumstances.

(R. 393-413; emphasis added).

2. The Judge Answered The Foreman's Question For the Sentencers -- A Finding On Mitigation Had To Be Unanimous.

After the jurors retired to deliberate penalty, they returned to the courtroom and asked the judge to clarify parts of the jury instructions. As the judge was explaining the statutory mitigating circumstance of mental or emotional disturbance, the foreman asked the judge point blank whether that mitigating circumstance had to be unanimously found before it could be considered, and the judge replied that it did:

> [THE COURT] That is to say, if he was under the influence of mental or emotional disturbance at the time of the murder, you should answer that, "Yes." If he was not or if you do not find that he was ... you would answer it, "No."
>
> FOREMAN: When you say "find", you mean unanimously find?
>
> THE COURT: Yes, sir. Yes, sir.
>
> FOREMAN: Thank you, sir.

(R. 413; emphasis added).

3. The Jurors' Sentencing Form Required Unanimity.

The jury took to the jury room a form entitled "ISSUES." On that form the jury provided the following answers to the following questions.

1. Do you unanimously find from the evidence and beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?

(A) Was the murder committed while the defendant was engaged in the commission of first degree burglary?

Answer: Yes.

(B) Was the murder committed while the defendant was engaged in a sex act.

Answer: Yes.

(C) Was the murder committed for pecuniary gain?

Answer: Yes.

(D) Was the murder especially heinous, atrocious or cruel?

Answer: Yes.

2. Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?

(A) Does the defendant have a significant history of prior criminal activity?

Answer: Yes.

(B) Was the defendant under the influence of mental or emotional disturbance at the time of the murder?

Answer: No.

(C) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired?

Answer: No.

(D) The age of the defendant at the time of the murder.

Answer: No .

(E) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value?

Answer: No .

3. Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

Answer: Yes .

4. Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

Answer: Yes .

This the 20th day of November, 1981.

Charles L. Marks /s/
Foreman

We, the jury, based upon the answers to the above issues, and as evidenced by the signature of the undersigned Foreman, unanimously recommend to the Court that the punishment of the defendant, Douglas Williams, Jr., be death .

This 20th day of November, 1981.

Charles L. Marks /s/

SUMMARY OF ARGUMENT

1. The Court of Appeals granted sentencing relief to Douglas Williams because his capital sentencing proceedings did not comport with the Eighth and Fourteenth Amendments as applied in Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), Mills v. Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990). For two reasons the court declined to address whether Mills and McKoy constituted "new law" under this Court's opinion in Teague v. Lane, 489 U.S. 288 (1989). First, the court held that the State had waived any non-retroactivity issue by failing to raise that issue in the district court or until after briefing and argument on appeal. Second, the Court held that even if Mills or McKoy were "new law", they came within an exception to the rule of non-retroactivity.

In its petition the State, in its second question presented and its second argument, purports to present the "waiver" issue as a basis for certiorari. But what the State represents to be the ruling by the lower court on this issue is not a complete or fair recitation of what the lower court actually held. The State writes that the lower court held only that non-retroactivity was an affirmative defense which had to be raised in the district court or it was waived. That is not why the State lost in the lower court.

The State's obfuscation on this issue is startlingly misleading. What the State failed to discuss in the petition is

that the lower court found waiver not just because of what the State did in the district court, but because of what the State did in the Court of Appeals. What the State actually did was the following:

a) in the Court of Appeals the State relied in its appellate brief and in oral argument on Teague v. Lane, 489 U.S. 288 (1989), as a bar to habeas corpus relief with respect to a claim under Ake v. Oklahoma, 470 U.S. 68 (1985); but

b) did not rely in its appellate brief or in oral argument on non-retroactivity as a bar to relief with respect to Douglas Williams' claim under Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 486 U.S. 367 (1988), choosing instead to respond to the Lockett/Mills claim on its supposed lack of constitutional merit; and,

c) waited until one week after the State's merits contention on the Lockett/Mills claim was rejected by this Court in McKoy v. North Carolina, 494 U.S. 433 (1990), to assert any non-retroactivity contention regarding the Lockett claim, well after oral argument and briefing.

The lower court found that under all of these facts, decidedly not just the single failure to assert non-retroactivity in the district court, the State had waived the issue of non-retroactivity. This conclusion cannot seriously be posited by the State as a basis for certiorari, and so it is not mentioned at all in the petition. Under the Federal Rules of Appellate Procedure, the contentions of the parties must be stated in their

briefs, and a failure to so state a contention routinely results in waiver of that contention. Having raised Teague as to one claim in its brief and argument, and having not raised Teague as to this Lockett claim, the State intentionally gambled on the merits of the Lockett claim. There is no split of authority on whether this constitutes a waiver of non-retroactivity, this basis for the lower court's judgment has not been challenged in the petition, and consequently the petition should be denied.

2. In its second question presented and second argument, the State has represented to this Court that there is a split in the lower federal courts regarding whether non-retroactivity is an affirmative defense which must be raised in the district court in response to a petition for writ of habeas corpus. None of the cases cited by the State even discuss "affirmative defense," and a fortiorari, none of the cases hold that non-retroactivity is an affirmative defense. Instead, the cases relied upon by the State are entirely consistent with what the lower court did in this case and reveal that no issue worthy of certiorari review arose when the lower court would not allow the State to withhold the "defense" of non-retroactivity until it became necessary to use it.

3. The lower court did not address whether Mills or McKoy were "new law" for non-retroactivity purposes. That question is not contained in the petition as a basis for certiorari. Should this Court grant the petition and ultimately reverse the lower court, then the lower court will have to address the new law

issue. Douglas Williams' sentence must be vacated as a result of the law that existed when the sentence became final, and reversing the lower court would not change the result in this case.

Douglas Williams' conviction and death sentence became final on direct appeal when this Court denied his petition for writ of certiorari on October 3, 1983. Williams v. North Carolina, 464 U.S. 865 (1983). "This Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), were rendered before [Douglas Williams'] conviction became final. Under the retroactivity principles adopted in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), [Douglas Williams] is entitled to the benefit of those decisions." Penry v. Lynaugh, 109 S.Ct. 2934, 2944-45 (1989).

Lockett and Eddings require that limitations or impediments to sentencer consideration of relevant mitigating circumstances be stricken. A requirement of unanimity on a finding of mitigating circumstances is such an impediment. Indeed, the State recognized this controlling and axiomatic Eighth Amendment principle ten years ago in State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988). There the State contended that "no juror should be precluded from considering anything in mitigation in the ultimate balancing process even if that mitigating factor was not agreed upon unanimously. To do

otherwise, the state believes, could run afoul of Lockett v. Ohio, supra." Brief for the state filed December 10, 1982, State v. Kirkley, No. 15A-81; see also State v. Kirkley, 302 S.E.2d 144, 163 (1983) (Exam, J. dissenting) (quoting State's brief). Over the years since Lockett the Lockett rule has not changed, and its application in Douglas Williams' case requires relief to be granted.

4. The lower court correctly found that a prohibition on a requirement of sentencer unanimity on a finding of a mitigating circumstance was a bedrock procedural requirement necessary to make capital sentencing determinations reliable.

REASONS WHY THE WRIT SHOULD NOT ISSUE

ARGUMENT

I.

THE STATE'S PETITION IS MISLEADING RECARDING THE BASES FOR THE LOWER COURT'S OPINION AND REGARDING THE STATE'S CONDUCT WHICH WARRANTED THE ACTION TAKEN BY THE LOWER COURT. WHAT THE LOWER COURT ACTUALLY HELD IN LIGHT OF THE STATE'S CONDUCT IS NOT WORTHY OF REVIEW -- THAT THE CONTENTIONS OF THE PARTIES ON APPEAL MUST BE STATED IN THEIR BRIEFS AND AT ORAL ARGUMENT.

In its petition the State does not dispute that Douglas Williams' capital sentencing proceeding was conducted in violation of the Eighth and Fourteenth Amendments. Neither does the State dispute that a new sentencing proceeding is required if the holdings in Mills v. Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990), are applied to Petitioner's case.[3] These conclusions by the United States Court of Appeals for the Fourth Circuit are unchallenged.

In the lower court, the State did argue that a capital sentencing scheme which required unanimity before a finding of a mitigating circumstance did not run afoul of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), and was constitutional. After Mills was announced, the State continued to press for resolution of the merits of this Lockett claim, arguing in the district court and in the court of appeals

[3]The sentencers were precluded from considering record evidence of, among other things, the defendant's age (19), his mental retardation, and his degree of intoxication, unless the jurors unanimously agreed that such factors were mitigating circumstances.

(in its brief and at oral argument) that Mills did not apply to North Carolina. After briefing and oral argument in the court of appeals, McKoy was decided in this Court. With that setback, the State attempted to raise the argument that non-retroactivity principles barred relief on the mitigation unanimity issue. The Court of Appeals treated the State's belated assertion of non-retroactivity in two, independent ways. As discussed in this argument, the court ruled that the State had waited too long on appeal to raise the issue. The Court also ruled that Mills fit an exception to non-retroactivity. See Argument IV, infra.

With respect to the "sandbagging" issue, the State contends that this case presents the following question: "Whether Teague is an affirmative defense which must be raised by the State in the district court or else is waived." Petition, p. i, question II. The State then argues that the writ should issue because "[t]he Fourth Circuit's decision on nonretroactivity as an affirmative defense adopts a position which is in conflict with the majority of the other circuits on this issue, and raises an important issue warranting review on certiorari." Petition, p. ii. Assuming for the sake of argument that this issue stated by the State is an important one, is an inherent part of this case, and that upon that issue there is a split in the circuits,[4] certiorari still should not be granted.

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[4]There is in fact no split in the circuits regarding the manner in which the lower court resolved the issues. The cases relied upon by the State to demonstrate such a split do not even address the issue which the state claims they address. See Argument II, infra.

This Court could completely agree with the State's arguments and the state would still lose. This is because the State did much more than not raise non-retroactivity in the district court -- the State did not raise the issue in its brief or at oral argument, and the Court of Appeals based its judgement on that critical additional failure by the State.[5] What the lower court held was that "the State waived any Teague defenses to the retroactive application of these rules by its failure to raise the issue at the district court level or at the first hearing [oral argument] before this Court." Williams, A 24.[6]

The State's petition does not mention this important component of the lower court's ruling. If the lower court was

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[5]Whether a defense is "affirmative" and must be raised in the district court is one question. Whether a party must "brief" and "argue" contentions in an appellate brief and at oral argument is a separate issue. The lower court found that the State had neither raised the issue in the district court nor relied upon it in its brief and oral argument on appeal. Even if the "affirmative defense" issue is worthy of review, which it is not, see Argument II, infra, the lower court's judgment would nevertheless stand on the "must brief and argue on appeal" issue.

[6]As the lower court further explained, "[d]espite the fact that Williams raised the Mills issue before the district court, the State admittedly did not raise the retroactivity issue until after the McKoy decision was rendered. At that time, and well after the first oral argument had been held before this court, the State cited this court to additional authority pursuant to Fed. R. App. P. 28(j) and raised the retroactivity issue for the first time." Williams, supra, A. 19. The court then wrote that it was not just the failure to raise the issue in the district court but also the failure to raise the issue in a timely manner during the appeal process that barred the State: "Because of the State's failure to raise the issue until after the district court's decision and this court's first hearing on appeal, we are confronted with the issue of whether the State's failure amounts to a waiver of the issue." Id.

empowered to bar the Teague issue because it was not timely raised on appeal, then the State's petition for writ of certiorari should be denied, even if it contains other issues worthy of certiorari. Addressing such other issues would be largely advisory -- even if Teague would bar relief, and even if McKoy does not fit an exception to Teague, the State's appellate level waiver spells relief for Douglas Williams.

The lower court was empowered to bar the Teague issue, based upon the State's conduct. Failure to raise issues on appeal in an appropriate manner routinely results in their waiver, and for a Court of Appeals to enforce such a fundamental waiver is not a matter warranting certiorari review. There is no conflict in the lower federal courts with respect to the propriety of such an exercise of discretion by a federal appellate court, and the manner in which the Court of Appeals acted raises no important question warranting review.

To reach its ruling, the Court of Appeals first looked to this Court's jurisprudence regarding non-retroactivity and whether it is a jurisdictional issue. This Court has instructed the lower federal courts that "[a]lthough the Teague rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte." Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 2718 (1990). Citing Collins, the Court of Appeals began with the pedestrian proposition that it could, but was not

required to, consider non-retroactivity when the State failed to raise the issue.

The Court of Appeals then correctly concluded that the State had not raised the issue. To raise an issue, a party must present the issue in that party's initial brief. F.R.A.P. Rule 28(a)(2) and 28(b). Issues not raised in the briefs and raised for the first time in oral argument or through notice of supplemental authority need not be addressed by a Court of Appeals and can be deemed waived. This rule is fundamental and is routinely enforced throughout the federal courts. See Piazza v. Aponte Rogue, 909 F.2d 35, 37 (1st Cir. 1990) ("Except in extraordinary circumstances not present here, a court of appeals will not consider an issue raised for the first time at oral argument."); Playboy Enterprises v. Public Service Commission of Puerto Rico, 906 F.2d 25. 40 (1st Cir. 1990) ("Even if the defendants had not waived this issue by failing to raise it before Judge Pieras, they waived it by raising it too late on appeal."); McGruder v. Necaise, 735 F.2d 1146, 1148 (5th Cir. 1984) ("We will not consider issues not briefed."); CH ZM Hill Central, Inc. v. Madison - Madison International, Inc., 895 F.2d 286, 290 n. 6 (7th Cir. 1989) ("It is well settled that issues not discussed in the parties' appellate briefs are waived."); Borough v. Daluth, N. and I.R. Railway, 762 F.2d 66, 68-69 n.1 (8th Cir. 1985) (issue not briefed deemed waived); Miller v. Fairchild Industries, 797 F.2d 727, 739 (9th Cir. 1986) (will not consider matters not briefed); Abercrombie v. City of Catoosa,

896 F.2d 1228, 1231 (10th Cir. 1990) ("[H]e failed to argue this issue in his appellate brief or at oral argument. Therefore we conclude that plaintiff has waived the issue."); United States v. Blasco, 702 F.2d 1315, 1332 n. 28 (11th Cir.), cert denied, 464 U.S. 914 (1983) (cannot after oral argument via a notice of supplemental authority raise an issue that was not contained in the briefs).[7]

The State did not contend in its brief or at oral argument that Petitioner's Lockett/Mills claim was subject to a non-retroactivity analysis. Instead, the State -- in its brief and during argument -- urged the Court of Appeals to rule on the merits of the claim. Upon learning that the claim had merit, the State attempted to change course, but the lower Court was unmoved:

> Even after Teague was decided, the State did not raise the retroactivity issue [vis-a-vis the Mills issue][8] in its first arguments before this Court. It was not until the decision was handed down in McKoy that the state decided to raise the retroactivity issue. We believe that was too late.

Williams, A 23.

This narrow fact-bound ruling by the Court of Appeals was correct, and even if this Court would not have so ruled the lower court's action was not an abuse of discretion and is not worthy

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[7]See 16 C. Wright, A. Miller, E. Cooper, and E. Gressman, Federal Practice and Procedure, Section 397, at 421, 427 (1977), and 1992 Supplement at pages 643-646 for statement of this axiomatic waiver rule and legion of cases applying it.

[8]As noted, Teague was relied upon by the State in its initial brief regarding an Ake claim.

of certiorari review.[9] The Court of Appeals stressed that its decision was not the result of some ironclad rule but was based upon "the facts before us." Williams, A 23. "In this case, the chronology of events is very important," Id, at 18, as it will be in every case.[10] Those facts in Petitioner's case show a conscious tactic and strategy on the part of the State not to assert a non-retroactivity defense on the Lockett/Mills claim in a timely manner, and amply demonstrate that the lower court did not act in an abusive manner.

Douglas Williams presented in his petition filed in the district court the claim that under Lockett a requirement of juror unanimity on mitigating circumstances violated the Eighth

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[9]This action by the lower court is entirely consistent with appellate procedure as detailed above, and the Court of Appeals' refusal to let the State off the hook was not an abuse of discretion. Becton Dickinson and Company v. C.R. Bard, Inc., 922 F.2d 792, 800 (Fed. Cir. 1990)("This practice [of finding waiver] is, of course, not governed by a rigid rule but may as a matter of discretion not be adhered to ....").

[10]The State's contention that the lower court's actions conflict with other Court of Appeals decisions is incorrect, but even if accurate such a conflict would present no reason for granting certiorari. First, there are no cases cited by the State which present the same facts as Douglas Williams' case: a.) the State raising non-retroactivity as to one claim but not another in appellate briefs and oral argument, and b.) later attempting to raise non-retroactivity on the other issue only after losing the merits of the other issue in this Court.

Second, when a rule of procedure is governed by an abuse of discretion standard, such as exists in the rule barring the raising of issues not raised in the briefs, then different courts will necessarily reach different conclusions even on the same facts. That does not create an issue worthy of certiorari.

In any event, the cases relied upon by the State do not show a split in the circuit court decisions, and there is not one.

and Fourteenth Amendments. The State answered that Lockett was not violated by such a requirement. Mills was decided June 6, 1988, while the habeas corpus petition was still pending in the district court. Counsel for Douglas Williams alerted the district court to Mills, and the state was directed to file a response to Mills. The State did so on July 22, 1988, and again encouraged the district court to rule against Petitioner solely on the merits of his claim. The district court did so by Order entered September 13, 1988, and denied relief on the merits.

Teague was decided five months later on February 22, 1989. The day before, February 21, 1989, certiorari was granted in McKoy. Counsel for the State in this case was also counsel in McKoy before this Court. Penry was decided June 26, 1989. At least as of that date, counsel for the State knew that this Court could rule in McKoy in favor of the merits position being asserted by Douglas Williams, and that capital habeas corpus petitioners faced serious new obstacles when seeking relief on the basis of new rules.

Counsel for Douglas Williams cited in the Brief of Appellant filed in the court of appeals the grant of certiorari in McKoy. The State filed its brief on August 29, 1989. The State was well aware of Teague, and its rule of non-retroactivity, when the Brief of Appellees was filed. The State expressly relied upon Teague with respect to one issue raised by Petitioner. In the text of the Brief of the Appellees on page 101, the state wrote that Teague prohibited the retroactive application of Ake v.

Oklahoma, 470 U.S. 68 (1985) to Petitioner's case. See Brief of Appellees, p. 101, n.17 ("Indeed, Ake appears not to be retroactive to cases on collateral review. Thus, any claim to a due process right to experts based upon Ake cannot be of benefit to Williams. Teague v. Lane, supra.").[11]

Oral argument was held November 2, 1989. At oral argument, the State urged the positions contained in the State's brief. Before oral argument, counsel for Douglas Williams sought to have the proceedings held in abeyance because McKoy would control Petitioner's case. See Motion to Postpone Oral Argument Pending Decision in McKoy v. North Carolina. The State responded to the Motion, again without relying upon non-retroactivity.

Four months later McKoy was decided. As the Court of Appeals wrote, "[d]espite the fact that Williams raised the Mills issue before the district court, the State admittedly did not raise the retroactivity issue until after the McKoy decision was rendered. At that time, and well after the first oral argument had been held before this court, the State cited this court to additional authority pursuant to Fed. R. App. P. 28(j) and raised the retroactivity issue for the first time." Williams, supra, A 19.

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[11]The State also had read Penry v. Lynaugh, 492 U.S. 302 (1989), before filing Respondent's brief and relied upon and cited Penry at page 79 of its brief, albeit not for retroactivity purposes. Inasmuch as counsel had read Penry, then the non-retroactivity language in Penry was known by the State when the State's brief was filed.

Under the case law, a clearer case of waiver could not be constructed. Non-retroactivity as to one issue was raised in the State's brief; it was specifically not raised, however, as to the Mills/McKoy issue, which the State chose to tackle strictly on the merits. That position proved to be ill-advised, but that does not relieve the State of its considered choices and their consequences.

The State seeks in its petition to be forgiven for its actions by asserting two unconvincing rationales. First, the State contends that at the relevant times, i.e., during briefing and argument before the court of appeals, the meaning of Teague was "in doubt," was not "clarified," had not been "made clear," and that the State asserted Teague as a defense to Douglas Williams' claim the moment the defense became "plausible," which was not until this Court decided "Saffle, Sawyer, and Butler." Petition, pages 20-21. This explanation does not hold water, inasmuch as the State was not so baffled by Teague as to fail to include it as authority in its Brief with respect to the purported non-retroactivity of Ake. The State cannot explain how Teague was a "plausible" defense vis-a-vis Ake but not other issues.

Second, the State contends that "this Court did not make clear until McKoy that there was to be a 'new rule' which the state should seek to defend as non-retroactive ...." Petition,

page 20.[12] Teague and Penry made clear that the time for the State to argue against application of a new rule is when a petitioner seeks its announcement or its benefit in federal habeas corpus proceedings. Indeed, no new rule will be announced in habeas corpus actions if the State or court raises Teague. That is the reason for Teague. Here the State, relying on its assumed persuasive power before this Court in McKoy, took the chance that there would be no rule that would benefit Petitioner. Counsel was wrong. Counsel being wrong is not a basis for certiorari review, and can hardly form the basis for suggesting that a Court of Appeals abused its discretion.

What the State of North Carolina seeks is a new rule which would require a Court of Appeals to entertain State contentions which are first presented when an opinion is imminent and which are contrary to the positions taken in the briefs, pressed by the State, and earnestly urged on the Court of Appeals for years. While it may be that a Court of Appeals may consider such eleventh hour contentions by a state, there is no requirement that a Court of Appeals do so, absent jurisdictional concerns, and no issue worthy of certiorari arose when the Court of Appeals declined to excuse the State's sandbagging.

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[12]Douglas Williams' position is that McKoy did not establish a new rule. The lower court did not hold that any new rule had been established, and the State did not present in its petition the issue of whether McKoy involves a new rule. See Argument III, infra.

ARGUMENT

II.

NO CASES RELIED UPON BY THE STATE EVEN REFER TO TEAGUE AS AN AFFIRMATIVE DEFENSE, AND, BASED UPON THE STATE'S CASES, THERE IS NO SPLIT OF AUTHORITY AFTER COLLINS V. YOUNGBLOOD, 497 U.S. 37 (1990), REGARDING WHETHER THE STATE CAN WAIVE THE ISSUE OF NON-RETROACTIVITY.

The petition reads: "the Fourth Circuit's decision on non-retroactivity as an affirmative defense adopts a position which is in conflict with the majority of the other circuits on this issue, and raises an important issue warranting review on certiorari." There not only is no "sharp division" regarding the actions taken by the lower court, there also is no mention of Teague as an affirmative defense in any of the cases relied upon by the State.[13] The petition should be denied.

Some of the cases cited by the State do reach different results on the similar issues that they do address, but those different results are attributable to whether the opinion in question was announced before or after this Court's decision in Collins v. Youngblood, 497 U.S. 37 (1990). Before Youngblood, some Courts felt compelled to reach the Teague issue because it

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[13]At pages 18-19 of the petition the State presents eight cases which the State contends reveal "sharp division" on this issue. While Douglas Williams does concede that two dissenting judges in Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989)(en banc), have disagreed with each other about whether non-retroactivity is an affirmative defense, as noted at page 19 of the petition, those two dissenting opinions contain the only reference to Teague as an affirmative defense to be found in the eight opinions posited by the State as illustrating a conflict in the circuits on the affirmative defense issue. The petition is seriously misleading.

was thought to be jurisdictional; after Youngblood clarified that the issue was not a jurisdictional one, courts turned to the facts of individual cases to determine whether the equities warranted reviewing the tardy Teague issue.[14] The Court of Appeals' decision below is perfectly in harmony with all these other post-Youngblood decisions relied upon in the State's petition, and there is no split discernable in the circuits regarding whether waiver can be considered.

The only two opinions cited by the State which could arguably be in conflict with the result in Petitioner's case were decided before Youngblood and both suffer from a "non-retroactivity is jurisdictional" flavor. Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989), and Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir 1989) (en banc), emulated this Court's actions in Teague by addressing non-retroactivity despite its not having been raised by the parties. Given Teague, in which this Court addressed the issue sua sponte, it was not unreasonable for a lower court to worry that the retroactivity issue was not simply a "threshold" habeas corpus issue but a threshold jurisdictional issue. These two court of appeals decisions reflect this jurisdictional concern. See Hill v. McMackin, supra, 893 F.2d at 813 (in light of Teague, court felt "compelled" to address non-

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[14]Collins v. Youngblood was decided June 21, 1990. In Youngblood, this Court wrote that "[a]lthough the Teague rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte." Collins v. Youngblood, 110 S.Ct. 2715, 2718 (1990).

retroactivity, although not raised by the parties); Hopkinson v. Shillinger, 888 F.2d at 1288 ("[W]e sua sponte raised the issue in this case because the very scope of the writ of habeas corpus, and therefore our power to grant the writ is implicated. Cf. Teague.") (emphasis added).[15]

Post-Youngblood opinions cited by the State are directly in line with the decision below. First, the State cites Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (en banc), ostensibly to point out its conflict with Hill v. McMackin, supra. But both are Sixth Circuit opinions, and the comparison between them is telling. The pre-Youngblood Sixth Circuit opinion (McMackin) addressed Teague notwithstanding the parties' failures to raise it. The post-Youngblood Sixth Circuit opinion -- Kordenbrock -- addressed the substantive merits of a constitutional claim because the State at no time argued non-retroactivity and so had "waived" it.[16]

The remaining opinions cited by the State -- Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990), Boardman v. Estelle, 957 F.2d 1523 (9th Cir. 1992), Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1991), Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989) (en banc),

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[15]Neither of these cases have anything to do with the State attempting to raise non-retroactivity late in the appellate process. Instead, they involve Court injected concerns that non-retroactivity had to be addressed.

[16]To whatever degree the panel opinion in Hill v. McMackin is inconsistent with the en banc opinion in Kordenbrock, Kordenbrock controls, Hill v. McMackin is no longer the law in the Sixth Circuit, and the Sixth Circuit position does not conflict with the Fourth Circuit's position reflected in the opinion below.

and Smith v. Black, 904 F.2d 950 (5th Cir. 1990), Petition at 18-19, also show that there is no post-Youngblood split in the circuits. Card, Boardman, and Hanrahan hold that the State can waive the issue of non-retroactivity,[17] Moore v. Zant has nothing at all to do with the issue,[18] and Smith v. Black has been vacated and, even were it still in existence, is consistent with the decision in this case.

In Card and Boardman (as in Douglas Williams' case), the courts mention Youngblood and then set about deciding whether the court must address an unraised non-retroactivity issue. In Card, the court ruled that because the issue of non-retroactivity had not been raised by the state and was not jurisdictional, the court would not sua sponte address it. In Boardman, the court declined to allow the State to assert Teague for the first time in a petition for rehearing. The court cited Youngblood and ruled that "courts of appeals have discretion, but are not required, to address a Teague defense raised for the first time on appeal (or, perhaps, in a petition for rehearing)." Boardman, 957 F.2d at 1537.[19]

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[17]Again, the concept of "affirmative defense" is not mentioned in any of these opinions.

[18]See footnote 13, supra.

[19]As the court wrote:

> We will not save the state from such a gaffe. The Supreme Court has enforced strict procedural forfeitures on habeas petitioners in the interests of efficient and final adjudication. Why should not the state be

(continued...)

In Black v. Smith, which this Court has now vacated, 112 S.Ct. 1463 (1992), the Court of Appeals had requested supplemental briefs "on the issues spawned by Teague," Smith, 904 F.2d at 981, n.12, issues which no party had raised. Upon receiving these briefs, the Court ruled that the "better choice" under the circumstances was to address Teague. Id.[20] Smith is not inconsistent, and does not conflict, with the result below. First, Smith involved a court deciding on its own that it wished to address non-retroactivity. Clearly a court may do that, and the lower court acknowledged in Douglas Williams' case that it could have entertained non-retroactivity. What Smith underlined was that when the parties have not raised the issue it is a federal appellate court's choice whether to address non-retroactivity. Smith said nothing about waiving non-retroactivity. It spoke only to whether a Court could consider

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[19](...continued)
similarly held to a pedestrian rule of appellate procedure?

Boardman, 957 F.2d at 1537. This Court denied the State's petition for writ of certiorari in Boardman on October 5, 1992. In that petition the State challenged the finding of waiver.

[20]Youngblood was decided five days before the Fifth Circuit's opinion in Smith v. Black. At footnote 12 of the Smith opinion the court stressed that this Court had sua sponte addressed retroactivity in Teague and Saffle v. Parks, 110 S.Ct. 1257 (1990). Based upon this Court's actions there, and the fact that the Smith court had requested and received briefs specifically on the Teague issue, the Smith court considered it proper to address non-retroactivity.

In footnote 12 in Smith this Court's Youngblood opinion is noted with a "Cf." signal. It appears that the Smith opinion was virtually completely written when this Court decided Youngblood, and Youngblood was added to this almost finished product.

non-retroactivity when it had not been raised. That is a matter of "choice" under the circumstances, id, and different results will attach to different circumstances.[21] What may be the "better choice" under the circumstances in Smith may be the worse choice under the circumstances in another case, i.e., Douglas Williams' case.

No post-Youngblood opinion found by counsel is inconsistent with what the lower court did. The lower court in Douglas Williams' did not rule that there could be no circumstances under which non-retroactivity could be heard on appeal although not raised in the district court, only that "on the facts before us, the State missed the boat.'" Williams, A 23. Without regard to whether a Court may entertain non-retroactivity when not raised by the parties, there is no opinion to which the state can point post-Youngblood that holds that an appellate court must apply non-retroactivity when it is not raised at all, or when it has been held back as a defense by the state on appeal. Yet, as the State's cited opinions show, there is ample support for Douglas Williams' position and the lower court's holding that the State

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[21]Such different results do not constitute a conflict in the circuits in the Rule 10 sense of the phrase. If a rule of law allows discretion, then different results will naturally flow from application of the same rule.

can be held accountable for its actions and choices."

Certiorari should be denied.

ARGUMENT

III.

NEITHER MILLS NOR MCKOY ANNOUNCED A NEW RULE, AND THE LOWER COURT'S JUDGMENT WOULD NOT BE DISTURBED BY THIS COURT GRANTING CERTIORARI AND REVERSING.

The Court of Appeals did not find that Mills or McKoy announced new constitutional principles. The State has not presented in its petition the issue of whether new constitutional principles were announced in Mills or McKoy. If this Court grants certiorari and finds that the lower court 1.) abused its discretion by requiring that issues be presented on appeal at least by the time of oral argument, and 2.) was wrong in holding, as an alternative and independent basis for relief, that Mills/McKoy involved the second Teague exception, then on remand the Court of Appeals would be required to address the issue that

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"Another example, Hanrahan, supra, which was relied upon by the lower court, specifically holds that while a court may, it cannot be said that a court must, allow a state to hold back a non-retroactivity defense. In Hanrahan, the Seventh Circuit Court noted that, as here, the district court had requested briefs on the implications of a new decision. The state, as here, submitted a brief on the merits without any argument of non-retroactivity. It was not until appeal that the State sought to interpose a non-retroactivity claim, and the court found that that was too late.

Douglas Williams' case is consistent with, but does not go as far as, Hanrahan. The State did not raise non-retroactivity in its brief or at oral argument here. In Hanrahan, the State at least sought to interpose the issue through its briefs.

it reserved, i.e., whether Mills and McKoy involve a new rule.[23] Because they do not involve a new rule, ultimately the same judgment would be entered by the Court of Appeals -- sentencing relief for a nineteen year old mentally retarded defendant.

The jury instructions and judge comments at Douglas Williams' capital sentencing proceeding created the intolerable risk that Douglas Williams was sentenced to death without receiving juror consideration of his sub-average intellectual functioning, youth, and impaired mental condition at the time of the offense.[24] By prohibiting juror consideration of Douglas Williams's mental retardation, for example, unless all jurors found it to be mitigating, the trial court prevented the jury from expressing a reasoned moral response to that evidence. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).[25] This Eighth Amendment violation requires resentencing under the law existing at the time Douglas Williams' conviction became final. Douglas Williams would be entitled to

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[23]The State has not presented as a supposed basis for granting certiorari that Mills/McKoy are new law. Consequently, that issue cannot be urged if certiorari is granted. Rule 14.1(a).

[24]As the prosecutor argued to the jury:

> I'm sure [defense counsel] will argue to you that the defendant has a low I.Q. [63], and you shouldn't put him on trial for being stupid.

(R. 386).

[25]The State concedes that the sentencers were expressly required to be unanimous on any finding of mitigation. See Petition, p.8, n.2.

relief regardless of a grant of certiorari, and the petition should be denied.

A. At The Time The Defendant's Conviction and Death Sentence Became Final On Direct Appeal, The Eighth Amendment Dictated That No Capital Sentencer Could Be Precluded From Considering Anything Relevant That Was Offered As Mitigation.

1. Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) Require That No Sentencer Be Precluded From Considering Mitigating Evidence.

Douglas Williams' conviction and death sentence became final on direct appeal when the United States Supreme Court denied his petition for writ of certiorari on October 3, 1983. Williams v. North Carolina, 464 U.S. 865 (1983). "This Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), were rendered before [Douglas Williams'] conviction became final. Under the retroactivity principles adopted in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), [Douglas Williams] is entitled to the benefit of those decisions." Penry v. Lynaugh, 109 S.Ct. 2934, 2944-45 (1989).

Both Lockett and Eddings involved restrictions on capital sentencers' consideration of mitigating circumstances, restrictions that had been condemned by this Court in 1976. Roberts v. Louisiana, 428 U.S. 325, 333 (1976)(condemning "[t]he constitutional vice of . . . lack of focus on . . . the character and propensities of the offender . . . ."); Jurek v. Texas, 428 U.S.

262, 271, 273-74 (1976) ("A jury must be allowed to consider on the basis of all relevant evidence . . . why [a death sentence] should not be imposed.") ("[A]s in Georgia and Florida, the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the . . . individual offender before it can impose a death sentence."); Gregg v. Georgia, 428 U.S. 187, 189 (1976) ("We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account . . . the character and propensities of the offender.' Pennsylvania ex. rel. Sullivan v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43 (1937).").

In Lockett, the Ohio statute had limited the number of mitigating circumstances that could be considered by the sentencer; in Eddings, the sentencing judge believed he was limited in the mitigating circumstances that could be considered. This Court found that the Ohio Statute and the Oklahoma judge violated the Court's 1976 jurisprudence, see Saffle v. Parks, 110 S.Ct. 1257, 1262, 1263 (1990) ("Lockett and Eddings reaffirmed the reasoning in Jurek" and "Lockett and Eddings command that the State must allow the jury to give effect to [all] mitigating evidence in making the sentencing decision.").

It was thus black-letter Eighth Amendment law at the time of Douglas Williams' trial and appeal that the state could not impede or restrict a sentencer's -- i.e., a juror's -- consideration of relevant mitigating circumstances. For example,

prohibiting a juror from considering mental retardation to be mitigating unless all eleven other jurors believed it was, would violate Lockett, Eddings, and the Court's 1976 decisions.

This axiomatic Eighth Amendment principle was recognized by the State in State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988), where the State contended that "no juror should be precluded from considering anything in mitigation in the ultimate balancing process even if that mitigating factor was not agreed upon unanimously. To do otherwise, the state believes, could run afoul of Lockett v. Ohio, supra." Brief for the state filed December 10, 1982, State v. Kirkley, No. 15A-81; see also State v. Kirkley, 302 S.E.2d 144, 163 (1983) (Exam, J. dissenting) (quoting State's brief). The North Carolina Supreme Court decision in Kirkley rejecting the contention of both parties and holding that a requirement of unanimity on mitigating circumstances was constitutional had no Eighth Amendment moorings.[26]

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[26]As far as Petitioner can determine, no other court has held that such a unanimity requirement would be constitutional.

2. Mills v. Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 110 S.Ct. 433 (1990) Verified Douglas Williams' Claim That The Law Applicable Before His Conviction Became Final Provided That No Sentencer Could Be Precluded From Considering Anything Relevant That Was Offered As Mitigating Evidence.

The rule extant during Douglas Williams' trial and direct appeal plainly was that a sentencer could not be precluded from considering relevant mitigating evidence when determining whether to sentence a person to death. See, e.g., Jurek; Gregg; Lockett; Eddings, supra. While there were certainly myriad ways to violate this rule, see, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987) (from instruction to jury not to consider nonstatutory mitigating circumstances, and refusal by sentencing judge to consider the same, "it could not be clearer . . . that the proceeding . . . did not comport with the requirements of . . Eddings . . . and Lockett . . . ."); Skipper v. South Carolina, 476 U.S. 1 (1986) ("It can hardly be disputed" that exclusion of evidence regarding defendant's post-offense conduct violated Lockett and Eddings); Penry v. Lynaugh, 109 S.Ct. 2934, 2952 (1989) ("Our reasoning in Lockett and Eddings . . . compels a remand for resentencing" in the "absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation . . . ."), there was nevertheless one clear and simple rule: a juror could not be prohibited from considering mitigation. The source of the

restriction might always be different; the legal result of the restriction would remain constant -- reversal.

In 1987, Hitchcock applied, and did not change, the rule of Lockett and Eddings -- "our cases hold that the exclusion of mitigation evidence of the sort at issue here renders the death sentence invalid." Hitchcock, supra, 107 S.Ct. at 1824 (emphasis added). In 1989, Penry applied, and did not change, the rule of Lockett and Eddings -- "[u]nderlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant . . . [and] our reasoning in Lockett and Eddings thus compels a remand for resentencing . . . ." Penry, 109 S.Ct. at 1952 (emphasis added).

In 1988, in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988), the Court applied, but did not change, the rule of Lockett and Eddings, "our current death penalty jurisprudence," id., 108 S.Ct. at 1862 (Brennan, J. concurring):

> [I]f Petitioner is correct, a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the sentence of death. See 310 Md., at 67, 527 A.2d, at 19. Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, Lockett v. Ohio, supra; Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); by the sentencing court, Eddings v. Oklahoma, supra; or by an evidentiary ruling, Skipper v. South Carolina, supra. The same must be true with respect to a single juror's holdout of a mitigating circumstance. Whatever the cause, if Douglas Williams's interpretation of the sentencing process is correct, the conclusion would be necessarily the same: "Because the

> [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing." Eddings v. Oklahoma, 455 U.S. at 117, n.*, 102 S.Ct., at 878, n.* (O,CONNOR, J., concurring).

Id., 108 S.Ct. at 1866 (emphasis added).

Again, the legal rule is that no barrier can be raised to a juror's consideration of relevant mitigating evidence. Since 1976, when this Court sees a barrier to sentencer consideration of mitigating evidence, "whatever the cause," "the same must be true," that is, resentencing. This legal rule is immutable, it is not evolving, and when any facts violate it "the [legal] conclusion would be necessarily the same." Id (emphasis added).

McKoy v. North Carolina, 110 S.Ct. 1227 (1990), came after Mills, but both cases were "compelled," McKoy, supra, 110 S.Ct. at 1232, by Eddings and Lockett,[27] see McKoy, supra, 110 S.Ct. at 1231 ("The unanimity requirement thus allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a 'sentence less than death.' Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982), quoting Lockett, supra, at 604, 98 S.Ct., at 2964, (plurality opinion).") We begin with Mills, then, only as a nod to chronology.

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[27]The decision in McKoy would have been the same with or without Mills, see McKoy, supra, 110 S.Ct. at 1234, n.8 ("In fact, this case [McKoy] presents an even clearer case for reversal than Mills . . . ."), because it is Lockett and Eddings that compel the result, not Mills.

Mills held that the following two capital sentencing scenarios would present the "height of arbitrariness" which "beyond dispute" would violate Eddings and Lockett. Mills, supra, 108 S.Ct. at 1865. First, a scheme that provides that "[i]f eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance is found," would plainly fail under Eddings and Lockett. Second, a scheme that allowed death in a situation in which "[a]ll twelve jurors might agree that some mitigating circumstances were present, and even that those mitigating circumstances were significant enough to outweigh any aggravating circumstances . . . [b]ut . . . all 12 could [not] agree that the same mitigating circumstance was present," id., would be patently unconstitutional.

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-1765, 64 L.Ed.2d 398 (1980)(plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the [two] circumstances so postulated . . . . It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978)(plurality opinion)(emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 1670-1671, 90 L.Ed.2d 1 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering

> 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114, 102 S.Ct., at 877.

Id. (footnotes omitted).

Even the Maryland Court of Appeals "did not dispute that if the statute and form were read as Petitioner suggested, jurors would be improperly prevented from giving due consideration to mitigating evidence." Id., 108 S.Ct. at 1864 (emphasis in original).[28] The only issue was whether the Mills jurors interpreted the jury instructions to require unanimity regarding mitigation. Id., 108 S.Ct. at 1867 ("While conceding that the Court of Appeals construction of the jury instructions and verdict form is plausible, we cannot conclude, with any degree of certainty, that the jury did not adopt Petitioner's interpretation of the jury instructions and verdict form.")

In McKoy the unanimity restriction was explicit, and required no interpretation by the Court. McKoy, supra, 110 S.Ct. at 1234, n.8 ("In this case, by contrast [with Mills], the instructions and verdict form expressly limited the jury's consideration to mitigating circumstances unanimously found.") The Court swept aside the North Carolina Supreme Court's refusal to accept the obvious consequence that the Eighth Amendment was violated by the unanimity requirement, again explained Lockett and Eddings, gently chided North Carolina's "purported" and

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[28]It appears that the North Carolina Supreme Court has stood alone in contending that a unanimity requirement for the finding and consideration of mitigating circumstances did not violate Lockett.

"inventive attempts to distinguish Mills," id., at 110 S.Ct. at 1231, and held that, with or without the aid of Mills ("In fact, this case presents an even clearer case for reversal than Mills . . . ", id., 110 S.Ct. at 1234, n.8), reversal was mandated.

Mills and McKoy thus support what Douglas Williams has argued all along, and what the State argued in the State's brief to the North Carolina Supreme Court in Kirkley. No juror may be precluded from considering relevant mitigating evidence when the juror is deciding whether a defendant should live or die. Florida ignored the rule for years, but it was this basic rule that mandated the result in Hitchcock. Texas violated the rule for years, but it was this basic rule that mandated Penry. North Carolina violated the rule for years, but it was this basic rule that mandated McKoy.

B. This Court's Recent Decisions Regarding Retroactivity Support the Contention That The Law At The Time Of Douglas Williams' Trial And Direct Appeal Prohibited Any Restraint On A Juror's Duty To Consider Mitigating Evidence.

As noted above, when the State lost McKoy in the United States Supreme Court, the State, for the first time in over six years of litigation on this Lockett claim in Douglas Williams' case, suggested to the court of appeals that "the relief now sought by Williams based upon McKoy would create a new rule under Teague v. Lane[, 109 S.Ct. 1060 (1989),] and Penry v. Lynaugh[, 109 S.Ct. 2934 (1989).]" See Respondent's Citation of Additional Authorities dated March 12, 1990; see also Respondent's Citation of Additional Authorities dated October 30, 1990. Of course,

Douglas Williams always presented his claim as an Eddings and Lockett claim and sought relief based upon that law which controlled at the time his conviction became final on direct appeal. His claim is hardly "based upon McKoy"; McKoy simply proves that Douglas Williams has been correct all along.

And that is what Penry and Saffle show as well. In Penry, the Petitioner alleged that the Texas sentencing scheme as applied in his case precluded sentencer consideration of, among other things, his mental retardation. This was because the jury was asked to address only three questions, none of which fully allowed consideration of Penry's evidence in mitigation.

> Although Penry offered mitigating evidence of his mental retardation and abused childhood as a basis for a sentence of life imprisonment rather than death, the jury that sentenced him was only able to express its views on the appropriate sentence by answering three questions: Did Penry act deliberately when he murdered Pamela Carpenter? Is there a probability that he will be dangerous in the future? Did he act unreasonably in response to provocation? The jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence.

Id., 109 S.Ct. at 2947. This Court considered Teague v. Lane, 109 S.Ct. 1060 (1989), before addressing the Petitioner's claims for relief because in Teague the Court determined that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague, 109 S.Ct. 1060. "In Teague, we defined a new rule as a rule that 'breaks new ground,' 'imposes a new

obligation on the States or the Federal government,' 'or was not dictated by precedent existing at the time the defendant's conviction became final.' Teague, supra, 489 U.S. at ___, 109 S.Ct. at ___. (emphasis in original)." Saffle v. Parks, 110 S.Ct. 1257, 1260 (1990). The Penry Court recognized what Douglas Williams has always contended:

> The rule Penry seeks - - that when such mitigating evidence is presented, Texas jurors must, upon request, be given instructions that make it possible to give effect to that mitigating evidence in determining whether the death penalty should be imposed - - is not a 'new rule' under Teague because it is dictated by Lockett and Eddings.

Id., 109 S.Ct. at 2947. The Penry Court wrote precisely what Douglas Williams has argued: a.) a juror must not be precluded from considering mitigation evidence, and b.) this is not a new rule.

In Saffle v. Parks, 110 S.Ct. 1257 (1990), the Court further explained that no new rule was involved in the notion that jurors may not be precluded from considering mitigating evidence. In Parks, the Petitioner sought application of a rule "that jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence." Id., 110 S.Ct. at 1260. In its explanation of why Petitioner Parks' rule would be a new rule, the Court verified that the rule Douglas Williams espouses is not. "[W]hether the state may instruct the sentencer to render its decision on the evidence without mercy" involves not "what mitigating evidence the jury

must be permitted to consider . . . but . . . how it must consider the mitigating evidence." Id., 110 S.Ct. at 1261.

> There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the state may guide the jury in considering and weighing those factors in reaching a decision.

Id., 110 S.Ct. at 1261. Williams wishes to receive application of the "what factors the jury must be permitted to consider" rule, not a "how the state may guide the jury in considering those factors" rule, which is the difference between Penry and Parks:

> To the extent that Penry's claim was that the Texas system prevented the jury from giving any mitigating effect to the evidence of his mental retardation and abuse in childhood, the decision that the claim did not require the creation of a new rule is not surprising. Lockett and Eddings command that the state must allow the jury to give effect to mitigating evidence in making the sentencing decision; Penry's contention was that Texas barred the jury from so acting. Here, by contrast, there is no contention that the state altogether prevented Parks' jury from considering, weighing, and giving effect to all the mitigating evidence that Parks put before them; rather, Parks' contention is that the State has unconstitutionally limited the manner in which his mitigating evidence may be considered . . . . [T]he former contention would come under the rule of Lockett . . . .; the latter does not.

Id., 110 S.Ct. at 1261-62. Douglas Williams contends that the unanimity requirement "would come under the rule of Lockett," id., a proposition which the McKoy Court readily affirmed.[29]

Hence, Douglas Williams is entitled to relief because the rule of Lockett and Eddings controlled when his sentence became final and require the relief he seeks.

ARGUMENT

IV.

PROHIBITING A REQUIREMENT OF SENTENCER UNANIMITY ON A FINDING OF MITIGATION IS IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND ACCORDINGLY PROVIDES RELIEF TO DOUGLAS WILLIAMS

Douglas Williams believes that non-retroactivity is not a concern in this case (as did Respondent, until McKoy issued). If retroactivity is a concern, and if Mills/McKoy are new law, Douglas Williams is still entitled to relief based upon the lower

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[29]Other federal courts have found no "new law" component respecting Mills issues. See, e.g., Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (en banc) (Mills applied to case in which conviction was final before Mills and McKoy); Smith v. Armontrout, 888 F.2d 530, 545 (8th Cir. 1989) ("The case [Mills] is written as a standard application of the rule that juries must be free to consider any and all evidence as a mitigating factor. This has been a familiar feature of the legal landscape since 1978, when Lockett v. Ohio was decided."); Davis v. Maynard, 869 F.2d 1401 (10th Cir. 1989); Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989); Dunkins v. Jones, Case No. CV86-H-2264-S (N.D. Ala. July 12, 1989) ("[I]t is plain that Mills v. Maryland does not constitute 'new law' . . . .) (Slip opinion at p. 25, n. 12); Byrd v. Delo, 733 F.Supp. 1334, 1343 (E.D. Mo. 1990); but see Thomas v. Jones, 742 F.Supp. 598 (S.D. Ala. 1990) (in a successor habeas petition setting, the court simply wrote without any explication that Mills announced a new rule).

court's correct conclusion that the second Teague exception was implicated.

The non-retroactivity doctrine has two exceptions, one that is especially relevant here. The Mills rule must be considered to be "'implicit in the concept of ordered liberty,'" Teague v. Lane, 109 S.Ct. 1060, 1075 (1989)(citation omitted), which requires the Mills rule to be applied in Douglas Williams' case as an exception to the rule barring retroactive application of new rules. In particular, if a new rule goes to the "accuracy" or the "fundamental fairness" of a criminal proceeding, id., 109 S.Ct. at 1076, then the new rule must be given retroactive effect.

Prohibiting a requirement of unanimity before mitigation may be considered is based upon the need and desire to have accurate and reliable sentencing determinations. Mills, supra, 108 S.Ct. at 1870. If a unanimity requirement creates "the height of arbitrariness," as the Court found in Mills, supra, 108 S.Ct. at 1865, then the elimination of that arbitrariness has as its very purpose an attempt to improve accuracy. If one of Douglas Williams' jurors prevented all of the jurors from considering mental retardation as mitigating by refusing to agree that it was, which is what the instructions allowed here, then Douglas Williams did not receive an accurate, reliable, and meaningful determination of whether death was proper.

Removing such a barrier to sentencer consideration of mitigating circumstances is "'implicit in the concept of ordered

liberty.'" Williams, A. 15 (citation omitted). Certiorari should be denied.

CONCLUSION

For the reasons stated above, and for the reasons stated in the opinion of the United States Court of Appeals for the Fourth Circuit, the State's petition for writ of certiorari should be denied.

Respectfully submitted,

*MARK EVAN OLIVE
2804 Glennis Court
Tallahassee, FL 32304
(904) 644-7710

Attorney for Respondent

* Counsel of Record

NO. 92-111

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

GARY T. DIXON, Warden, Central Prison,
Raleigh, North Carolina, and LACY H. THORNBURG,
Attorney General of the State of North Carolina,

Petitioners,

v.

DOUGLAS WILLIAMS, Jr.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I, Mark E. Olive, a member of the Bar of this Court, hereby certify that I have this day served counsel for Petitioners with a copy of Respondent's Brief in Opposition and Motion to Proceed in forma pauperis, by placing a photocopy of said documents in the United States Mail addressed to Barry S. McNeill, Assistant Attorney General, 104 Fayetteville Street Mall, Raleigh, N.C., 27602, with sufficient postage to effect service.

This the 20th day of October, 1992.

MARK EVAN OLIVE

2. Respondent was allowed to proceed in forma pauperis in the district court and in the court of appeals.

WHEREFORE, Respondent respectfully requests that the Court enter an order allowing him to proceed in forma pauperis.

Respectfully submitted:

*MARK EVAN OLIVE
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710
Attorney for Respondent

* Counsel of Record

MARK EVAN OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710

October 13, 1992

Frank Lorson, Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: 92-111, Dixon v. Williams

Dear Mr. Lorson:

As we discussed by telephone today, I am unable to file the op. cert in Dixon v. Williams by October 14, 1992, as directed by the Court. Other duties unfortunately have prevented me from effectively responding to the State's petition.

I request on behalf of Douglas Williams, who I was appointed to represent in the lower court, the opportunity to file the op. cert. on October 21, 1992, and have that filing be considered timely.

Thank-you for your kind assistance.

Sincerely,

Mark E. Olive

cc: Barry S. McNeill, Esq.

MARK EVAN OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710

RECEIVED
OCT 21 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

October 20, 1992

Frank Lorson, Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: 92-111, Dixon v. Williams

Dear Mr. Lorson:

Enclosed please find the Brief in Opposition and a motion to proceed in forma pauperis on behalf of the Respondent, Douglas Williams, in the above-referenced case. Also enclosed is a corrected letter requesting permission to file the Brief on October 21, 1992, as opposed to September 21, 1992.

Sincerely,

Mark E. Olive

cc: Barry S. McNeill, Esq.